

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

SEP 17 2009

**Clerk, U.S. District and
Bankruptcy Courts**

CENTER FOR PUBLIC INTEGRITY
910 17th Street, N.W., 7th Floor
Washington, DC 20006-2606,

Plaintiff,

v.

Civil Action No.

U.S. DEPARTMENT OF EDUCATION
400 Maryland Ave., S.W.
Washington, DC 20202-0001,

ARNE DUNCAN, in his official capacity as
U.S. Secretary of Education
400 Maryland Ave., S.W.
Washington, DC 20202-0001,

JOANN RYAN, in her official capacity as
Chief FOIA Officer
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-0001,

ROBERT WEHAUSEN, in his official capacity
as FOIA Public Liaison
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-0001, and

LINDA DARBY, in her official capacity as
FOIA Public Liaison
U.S. Department of Education
400 Maryland Ave., S.W.
Washington, DC 20202-0001,

Defendants.

Case: 1:09-cv-01765
Assigned To : Kennedy, Henry H.
Assign. Date : 9/17/2009
Description: FOIA/Privacy Act

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiff, the Center for Public Integrity ("the Center"), brings this action for declaratory
and injunctive relief, alleging as follows:

Nature of Action

1. This is an action for violation of the Center's rights under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, against the U.S. Department of Education ("ED"). This is also an action for violation of the Center's rights under the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and the Federal Declaratory Judgment Act, 28 U.S. C. §§ 2201 and 2202, against ED and against the named individual Defendants.

2. Since March 2009, Defendants have systematically and unlawfully denied the Center's rights, as a representative of the news media, *not* to be charged processing fees (except for certain duplication fees) in connection with the Center's FOIA requests to ED for agency records.

Jurisdiction and Venue

3. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B), 5 U.S.C. § 702, 28 U.S.C. § 1331, and 28 U.S.C. § 2201(a).

4. Venue lies in this district pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1391.

Parties

5. Plaintiff, Center for Public Integrity, is a District of Columbia corporation, a tax-exempt public charity and a nonprofit, nonpartisan, non-advocacy, independent journalism organization based in Washington, D.C. "The mission of the Center for Public Integrity is to produce original investigative journalism about significant public issues to make institutional power more transparent and accountable." Mission Statement, <http://www.publicintegrity.org/about/about.aspx?act=mission>.

6. Defendant U.S. Department of Education is an agency of the United States. It has possession and control over the records sought by the Center's FOIA requests.

7. Defendant Arne Duncan is U.S. Secretary of Education and is sued in his official capacity. Defendant ED acts at the direction of, and is subject to the supervision of, Defendant Duncan.

8. Defendant JoAnn Ryan is Chief FOIA Officer for Defendant ED and is sued in her official capacity. She has been delegated primary authority to administer FOIA on behalf of Defendant ED.

9. Defendant Robert Wehausen is a FOIA Public Liaison for Defendant ED and is sued in his official capacity. He is responsible for one or more of the determinations, made on behalf of Defendant ED, challenged by Plaintiff in this lawsuit.

10. Defendant Linda Darby is a FOIA Public Liaison for Defendant ED and is sued in her official capacity. She is responsible for one or more of the determinations, made on behalf of Defendant ED, challenged by Plaintiff in this lawsuit.

Plaintiff's Freedom of Information Requests

11. By letter to ED dated March 19, 2009 ("First Request"), Plaintiff requested copies of certain determination letters issued by ED's Office of Civil Rights.

12. By letter to ED dated July 8, 2009 ("Second Request"), Plaintiff requested copies of certain program review determination letters issued by ED.

13. By letter to ED dated July 29, 2009 ("Third Request"), Plaintiff requested copies of records related to ED's investigation of specified sex-discrimination complaints filed against the University of Wisconsin at Madison and the University of Virginia.

14. By letter to ED dated August 10, 2009 (“Fourth Request”), Plaintiff requested copies of records related to ED’s investigation of a specified “Clery Act” complaint filed against the University of Virginia.

15. Each of Plaintiff’s FOIA requests included a section headed “Request for fee reduction as a representative of the news media.”¹ FOIA provides that for a representative of the news media, fees may include duplication charges but not search charges, “when records are not sought for commercial use.” 5 U.S.C. § 552(a)(4)(A)(ii).

16. Each of Plaintiff’s FOIA requests included this information: “The Center for Public Integrity is a 501(c)(3) tax-exempt charity and a news media organization, and therefore this request should be exempt from all fees for search and review. This request is being made in connection with the Center’s newsgathering functions and not for any other commercial purpose. The Center intends to incorporate analysis of the requested information into one or more investigative reports.”

ED’s Unlawful Refusal to Accord News Media Status to the Center

17. By letter dated March 26, 2009, Defendant Wehausen acknowledged receipt of Plaintiff’s First Request and stated that the “request is determined to be a commercial request and, therefore, subject to search, review, and duplication fees.”

18. By letter dated July 15, 2009, Defendant Darby acknowledged receipt of Plaintiff’s Second Request and stated that the “request is determined to be a commercial use request and, therefore, subject to search, review, and duplication fees.”

19. By letter dated August 6, 2009, Defendant Darby acknowledged receipt of Plaintiff’s Third Request and stated that the “request is determined to be an ‘all other’ request

¹ Each FOIA request also included a request for a complete fee waiver, each of which ED denied. The Center has chosen not to contest the fee waiver denials.

and, therefore, subject to search fees after the first 2 hours, and duplication fees after the first 100 pages or \$3 per CD for documents recorded on CD.”

20. By letter dated August 20, 2009, Defendant Darby acknowledged receipt of Plaintiff’s Fourth Request and stated that the “request is determined to be an Other/Commercial request and, therefore, subject to search fees after the first 2 hours, and duplication fees after the first 100 pages or \$3.00 per CD.”

21. In each of these four letters from Defendant Wehausen or Defendant Darby, the only justification relevant to the denial of news media status to Plaintiff was, according to virtually identical language in each letter, “a review of your website [or ‘Web site,’ in one letter] where membership is required to receive the full benefits of your organization.” (That characterization of the Center and its website is not accurate (*see* ¶ 23), and even if accurate would not be determinative of the Center’s news media status.)

22. By letters to Defendant ED’s FOIA Appeals Office dated April 15, July 27, August 7, and August 26, 2009, Plaintiff appealed the respective denials of its requests to be accorded news media status under FOIA.

23. In each of its appeals, Plaintiff explained that its “members” are simply its donors, and that members and non-members enjoy equal access to the Center’s publications.

24. With each of its appeals, Plaintiff submitted numerous investigative reports it has recently published, in order to demonstrate that Plaintiff “gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience” – the statutory definition of “a representative of the news media.” 5 U.S.C. § 552(a)(4)(A)(ii) (amended 2007, adopting the definition set forth in Nat’l Sec. Archive v. Dep’t of Defense, 880 F.2d 1381, 1387 (D.C. Cir. 1989)).

25. With each of its appeals, Plaintiff submitted a list of dozens of journalism awards it has received. The appeal letters noted that these awards were “conferred on us by other representatives of the news media who consider us to be one of their own.”

Current Status of Plaintiff's Freedom of Information Requests

26. On July 2, 2009, Defendant ED produced certain records responsive to Plaintiff's First Request. The accompanying determination letter stated: “The documents are being provided to you free of charge on a CD. Please be advised that because no charges are being assessed for this FOIA request, it does not mean that no charges will be assessed for future FOIA requests. Each FOIA is handled on an individual basis.”

27. On August 14, 2009, Defendant ED produced one document responsive to Plaintiff's Second Request. The accompanying determination letter stated: “The Department has concluded that you fall within the category of a commercial requester and provisions of the FOIA allow the Department to recover the costs pertaining to your request. Nevertheless, the time associated with the research of the feasibility of your request was less than 2 hours; so there is no charge. This does not constitute the grant of a fee waiver, and does not infer or imply that you will be granted a fee waiver for future requests made under FOIA to the Department.”

28. On August 27, 2009, Defendant ED produced certain records responsive to the portion of Plaintiff's Third Request related to the University of Wisconsin at Madison. The accompanying determination letter made no demand for nor any mention of processing fees. Defendant ED has not yet issued a determination with respect to the remaining portion of Plaintiff's Third Request, related to the University of Virginia.

29. Defendant ED has not yet issued a determination with respect to Plaintiff's Fourth Request.

PLAINTIFF'S CLAIMS FOR RELIEF

COUNT I

Violations of the Freedom of Information Act

(5 U.S.C. § 552)

(Withholding of Records)

30. Plaintiff re-alleges and incorporates the allegations set forth in ¶¶ 1-29 as if set forth fully herein.

31. Defendant ED has not yet issued a determination on the portion of Plaintiff's Third Request related to the University of Virginia.

32. Defendant ED has not yet issued a determination with respect to Plaintiff's Fourth Request.

33. More than twenty working days have passed since Defendant ED received Plaintiff's Third Request and Plaintiff's Fourth Request. Plaintiff has therefore exhausted all applicable administrative remedies.

34. Plaintiff has a statutory right to these requested records, and there is no legal justification for Defendant ED's failure to make them available to Plaintiff.

COUNT II

Violations of the Freedom of Information Act

(5 U.S.C. § 552)

(Fee Classification)

35. Plaintiff re-alleges and incorporates the allegations set forth in ¶¶ 1-34 as if set forth fully herein.

36. Plaintiff qualifies to be classified as a "representative of the news media" under FOIA.

37. Defendant ED's declaration that it would assess search fees against Plaintiff with respect to Plaintiff's Third Request violates the fee provisions of FOIA.

38. More than twenty working days have passed since Defendant ED received the fee classification appeal related to Plaintiff's Third Request. Defendant ED has not issued a determination with respect to this appeal. Plaintiff has therefore exhausted all applicable administrative remedies.

COUNT III
Violations of the Administrative Procedure Act
(5 U.S.C. §§ 701-706)

39. Plaintiff re-alleges and incorporates the allegations set forth in ¶¶ 1-38 as if set forth fully herein.

40. Defendant ED's repeated declarations that it would assess search fees against Plaintiff constitute a wrongful withholding of requested agency records.

41. On information and belief, Defendant ED and other Defendants have adopted a policy and practice of interpreting FOIA and applicable regulations so as to deny Plaintiff the favorable fee assessment status accorded to representatives of the news media.

42. Defendants' application of FOIA and agency regulations, denying Plaintiff media status, is arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law, and lacking in substantial evidence or factual basis.

43. Since March 2009, Plaintiff has made several requests to Defendant ED for copies of agency records. Plaintiff anticipates that, in furtherance of its journalistic mission, it will make similar requests in the future. Defendants' policy with respect to Plaintiff's entitlement to classification as a "representative of the news media" constitutes a continuing barrier to Plaintiff's access rights under FOIA.

44. Plaintiff has exhausted all applicable administrative remedies.

Demand for Relief


WHEREFORE, Plaintiff requests that this Court:

1. Declare that Defendant ED's failure to produce the records specified in Count I is unlawful;
2. Order Defendant ED to make available to Plaintiff the records specified in Count I;
3. Declare that Plaintiff qualifies as a "representative of the news media" for purposes of assessing processing fees associated with Plaintiff's FOIA requests;
4. Order Defendants to classify Plaintiff as a "representative of the news media" for purposes of assessing processing fees associated with Plaintiff's FOIA requests;
5. Find that Defendants acted arbitrarily or capriciously with respect to the withholding of records Plaintiff requested, as provided by 5 U.S.C. 552(a)(4)(F)(i);
6. Award Plaintiff its costs and reasonable attorneys' fees in this action; and
7. Grant such other and further relief as the Court deems just and proper.

Respectfully submitted,



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Attorney for Plaintiff